SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1970

No. [redacted] 37

LAWRENCE F. WALLACE, Petitioner

v.

UNITED STATES OF AMERICA

BENJAMIN H. BOWIE, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioners pray that a Writ of Certiorari be issued to reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled case on May 6, 1969, and the denial on July 2, 1969, of the Petition for Rehearing en banc.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals of the District of Columbia was decided on May 6, 1969, and was amended on June 24, 1969. The Opinion and Amendment of the

United States District Court for the District of Columbia has not yet been reported, but a copy of said Opinion is attached hereto and prayed to be taken as a part hereof, marked as appendix No. 1.

JURISDICTION

The Opinion of the United States Court of Appeals for the District of Columbia was rendered on the 6th day of May, 1969. This Opinion was amended by the said Court on June 24, 1969, a copy of said Amendment is attached hereto and prayed to be taken as a part hereof, marked appendix No. 2. An Order extending time to file petition for certiorari to and including August 31, 1969 was entered July 31, 1969. Jurisdiction to issue the Writ is found in the provisions of 28 U.S.C.A., Sec. 1254.

QUESTIONS PRESENTED

1. Were the Petitioners denied due process of law when in the 8th week of trial, after one Defendant (Wallace) had testified and had been cross-examined and another (Donohue) had testified on direct examination, the government cross examined the defendant (Donahue) by using the contents of a tape recording which had been ordered by the Court prior to trial not to be used without reasonable notice to the defense.

2. Does the instant case justify an extension of *Bruton* to require a new trial for the petitioners notwithstanding the ephemeral opportunity for confrontation.

3. Was it reversible error to deny Petitioners the opportunity to present evidence of or cross examine complainant Barnes regarding his propensity for subornation of perjury.

CONSTITUTIONAL AMENDMENT AND STATUTES INVOLVED

Constitutional Provision:

Amendment 5;

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *

Statutes Involved:

Title 18, U.S. Code, Section 371, conspiracy
Title 22, D.C. Code, Section 704, bribery

STATEMENT

The Petitioners, Metropolitan Police Officers, were indicted for bribery and conspiracy on the complaint of one Robert Earl Barnes, a self-confessed housebreaker.

Robert Earl Barnes came to the District of Columbia in early 1964, after having committed several hundred burglaries in St. Louis and serving a total of 4 years in prison for all his collected criminal acts then having become a government agent or informer.

According to his own admissions, he committed around four hundred burglaries in the Metropolitan D.C. area between early 1964 and April, 1965, when he was incarcerated. He subsequently received two sentences for all of these crimes; fifteen years in Maryland and fifteen years in D.C., to run consecutively. Subsequently, the fifteen years in Maryland has been suspended and he is supposedly serving some time now in the District of Columbia area although his present whereabouts is unknown to appellants.

After being incarcerated in 1965, he performed as he did in St. Louis, and was the major government witness and organizer of the case against petitioners which was tried during the months of January, February and March 1967.

The witnesses produced by Barnes for the Government in an attempt to in some degree corroborate his testimony were all persons who had all been engaged most of their

lives in illegal activities. Many of these witnesses admitted their engagement in housebreakings and other illegal activities with the said Barnes and due to their so-called cooperation, have never been brought to trial for these said crimes.

Prior to the commencement of the petitioners' trial the said Robert Earl Barnes had suborned perjury by two of his friends, this fact being known to the defense counsel as well as the government. Notwithstanding this, the Court refused to allow cross examination of Barnes on this subject. However, in a subsequent case, cross examination was allowed and Barnes admitted that he had suborned perjury.

During pretrial discussions the Trial Judge required the government to turn over to defense counsel all statements made by the defendants that might be used in the trial The government advised the Court that it had taped conversations of some of the defendants but refused to divulge the names of who the conversations were with, or which defendants were involved, or the contents of the conversations. The Court directed that the tapes could not be used.

The government then made a further request stating that its intention was not to use them but would like to leave it open for their use upon reasonable notice and the Court stated that the government could only use the tapes upon giving reasonable notice to counsel for the defense.

The reason that the government gave in the first place for not wanting to divulge the name of its informer, who was a party to the taped conversation, was to protect him. The fact is that this informer was at all pertinent times incarcerated and it was the tape of this informer that was later used without reasonable notice.

The tape recordings which were used were incriminating against one co-defendant (Donohue) and mentioned Wallace and Bowie. The Court ruled that these conversations were taped after the alleged conspiracy had been concluded and they could not be considered by the jury as to Wallace and Bowie.

REASONS FOR GRANTING THE WRIT

1. In arguing the claim of undue prejudice to the petitioners for failure to give them reasonable notice before the controversial tapes were allowed to be used in cross examination of Defendant Donahue, the statement of the Court with regard to its reasoning for each initial action in protecting the government's incarcerated informer should be presented. The following quotation from the Trial Transcript, Vol. 24, pg. 3273, clarifies this.

> "THE COURT: We will go on the record.
>
> "You will recall, Mr. Sullivan, that during the pretrial you asked me to put a protective order around statements made to what we are calling Informer No. 1 and Informer No. 2, on the ground the two informers would be in jeopardy if their identities were revealed.
>
> "I read the statements of those two informers, as handed to me, solely with a view to determining whether or not their identities could be concealed. At that time I didn't understand the case. The names meant nothing to me and the incidents meant nothing to me. So all I was looking for was there any way to edit this, revamp it, in such a way that the identities wouldn't be revealed. I was satisfied there was no way I could practically do it. So I did put the protective order on it without knowing the substance of the case at all.
>
> "Now, I have since gone back quickly over the statements knowing a little bit more about the case. I have read them a bit more carefully."

At the commencement of the trial there was no reason the government informer, James Skeens, who was in jail at the time, could not have been protected and the taped statements of the defendants, which were ordered by the Court to be given to them, could not in fact have been delivered.

If counsel for petitioners had been afforded a transcript of the tapes before trial it could have then been demon-

strated to the Court that they would be highly prejudicial to these petitioners and no doubt the Court would then have granted petitioner's motion for severance, but as it was, the trial Court was understandably reluctant to grant a motion for severance on this crucial question near the end of a 10 week trial.

The attempt of Barnes to corroborate himself by the use of his underworld friends was weak and futile, and it can be clearly seen that the conviction of these two petitioners was obtained only by the use of these tapes which were in effect tainted by the methods employed by the government in not giving *any* notice.

The government from the outset knew that it was going to use these tapes, and further knew they were going to use them in a manner they considered to be most effective—that is, after Donohue had committed himself on direct testimony. This is shown by the following excerpts of the admonishment given to the prosecutor and demonstrates the horrible prejudice to the defendants.

"The Court addressing Government counsel:

p. 3199 The Court: This rebuttal problem has got me worried. I have been watching your trial tactics and what you do you lead a witness up to a point where he says no and you drop him. You are obviously going to try and put on rebuttal instead of going through cross-examination . . .

You are going to put in your direct case through rebuttal. I am not going to let you do it . . .

p. 3200 The Court: You are not opening up any new territory or anything like that. I am not going to sit here until Christmas while you rebut every word that everybody says. You drop everything in cross-examination. You get to a point where a fellow says no and you say, "Very Well", and walk away from it. There is your rebuttal setup.

I am not going to permit it unless it is a very material fact. Such questions as, "Do you know Skinner Skeens?" And he says "No", and you say "Very Well, sir", and you walk away. I am not going to let you bring in anything else . . .

p. 3200 The Court: It would be collateral. So far as Skinner Skeens is concerned it is completely collateral . . .

The Court: Yes.

I have been watching this, Mr. Sullivan, and your cross-examination tactics lead to nothing but rebuttal witnesses. We will have them lined up from here to Kingdom come while you are putting in your case through rebuttal. I am not going to permit it . . .

p. 3201 The Court: And while we are talking of Skinner Skeens, will you tell me what the relevance or materiality is in bringing in all these questions. "Do you know Skinner Skeens?" "Do you know Joe the Greek?" "Do you know Marsha Skeens?" What is the purpose of that? . . .

p. 3202 The Court: That is something else again, if he received it at a certain place. But why do you always go through this routine with every witness; getting a list of gangsters and molls and so forth—the same thing, "Do you know them?" . . .

p. 3202 The Court: Well, why prove that X knows Y at all? . . .

The Court: I can't read it that way. That is what is bothering me. When I read this record and just see you setting up a list of straw men and knock them down, "Do you know this", "Do you know that"—do you know this fellow or this girl and he says no and you walk away. So he knows him, what does that prove? . . .

p. 3203 The Court: That doesn't answer my question. Why do you have to set up this list of people because Skinner Skeens was a co-conspirator.

The Court: Well, if you treat him that way—if he had been in this case I would have dismissed it at the end of the Government's case as to him. You haven't put him in the conspiracy at all. You haven't put Riggin in a conspiracy. You haven't put Joe the Greek in the conspiracy and you haven't put the race horse in the conspiracy. I don't get the relevance. I am inclined to strike a lot of the testimony on this on further reflection.

It seems to me that you are proving guilt by association to be very blunt about it. You set up all these people and prove they are gamblers and prove they are whatever they are and then you say, "Do you know them?" And then you walk away from it. But you don't relate the relationship to the case. You prove that Skinner is a burglar, so what?

p. 3204 The Court: That doesn't put them in this conspiracy. You proved that he was a fence but that is in the next case, but not in this one.

The Court: Take the last 10 or 11 questions of who was on the stand yesterday?

The Court: You asked him about six or seven people that had no bearing on this case. At least so far you haven't tied it in with the case.

p. 3205 The Court: Well, I am suggesting you watch it because I am afraid—

p. 3205 The Court: That is right. Your case is over with and you haven't put these people in the conspiracy. They are not

co-conspirators. They are not named as co-conspirators. You have got them bracketed under this wonderful phrase "and others unknown to the Grand Jury", and you don't put them into a conspiracy, Mr. Sullivan.

The Court: What has Marsha got to do with it except sex appeal?

The Court: What is she doing in this conspiracy?

p. 3206 The Court: Why didn't you put her on the stand then to testify to the conversation if it is relevant and material to your case in chief? Where are we now?

The Court: That is what I am talking about—your rebuttal case. It is going to be your case in chief the way you have set it up.

The Court: You are evading my question—what are you doing with the rest of these people? Why do their names always have to be dragged in with every witness?

p. 3207 The Court: We have a rebuttal witness for every witness and then they will have to come back and rebut them so we will be here until Christmas. If it relates to the case in chief it should have been in. All right, go ahead.

The Court: Supposing somebody, Mr. Sullivan—supposing Mr. Donohue says, "Yes, I know Marsha Skeens", now what probative value does that have?

p. 3208 The Court: He never goes anywhere with it. He just says, "Do you know Jake the gambler". If we allow the rebuttal that is all he can rebut.

The Court: You are not going to get away with rebutting matter that hasn't

been put in evidence. When he asks the question do you know so and so and the witness says no, it is purely a collateral matter, and he should be bound by it. Suppose I get liberal about it and allow him to put on a rebuttal witness. He can ask that rebuttal witness one question, do you know that fellow who says he doesn't know you. You can't go any further with it. He is through.

p. 3209 The Court: All right, what does it add to the case that Wallace was at Skeen's house unless you put Skeens in the conspiracy to be bribed by Barnes. He was not in that conspiracy.

The Court: Unless you show that the money went through Skeens or something like that. But you don't connect him in the conspiracy.

p. 3210 The Court: You have failed to establish any of these things, Mr. Sullivan, and you still go back to these collateral matters and this should have been part of your case. Where is it?

The Court: You have walked away from it.

The Court: So Wallace and Skeens were together five times, what have you proved?

The Court: You are assuming a fact that is not in evidence.

p. 3211 The Court: Let me repeat, if Skeens were in that indictment and I had the Government's case in chief, at the end of the Government's case, I would dismiss it against Skeens. He hasn't been tied into the case. He is a burglar operating with Barnes. He is not in this bribery case. He is in that next fencing case you have got. He is one of the burglars and he is one of

the defendants but he is not in the bribery conspiracy.

The Court: He is just a name being bandied around.

The United States Court of Appeals for the District of Columbia in its opinion of May 6, 1969, on pages 8 and 9 also admonished the prosecutor as follows: "A trial involving charges of police corruption, lasting many weeks, most probably cannot be quarantined even with the best efforts of all concerned. However, the prosecution does bear a special responsibility to avoid tactics that needlessly add spice to the atmosphere which inevitably will hang over such trials. We are not impressed by the prosecutor's questioning appellants about connections with criminal characters where the inquiries were never tied up with the incidents charged at trial, nor by what we consider to be a trial needlessly prolonged by a lengthy cataloguing of incidents involving the protagonist, Barnes, which often did not even involve any of the appellants. The prosecutor may have thought that appellants' general acquaintance with the criminal element in the District would help to establish the conspiracy, a doubtful proposition for a group of detectives who can be expected to know who's who in the underworld. In any event, the cumulative potential for prejudice in open-ended questioning outweighed the materiality of the disclosure that appellants were acquainted with a number of local criminals. When it became apparent that these questions were leading nowhere, the trial court cut them short, in time, we think, to prevent undue prejudice to appellants. . . ."

Petitioners, however, having been on the receiving end of this barrage know what a prejudicial effect it had and that it was not just adding "spice to the atmosphere".

WITH THIS ABOVE BACKGROUND WE NOW REACH THE CLIMAX OF THE GOVERNMENT'S UNFAIR USE OF THE TAPE WHICH AMOUNTS TO SUCH PREJUDICE TO THE PETITIONERS AS TO AMOUNT TO A DENIAL OF DUE PROCESS.

The U.S. Attorney's office stated unequivocally during pre-trial that it was their intention not to make use of any tape recordings of defendants' conversations and if they determined otherwise to give the defense reasonable notice.

No notice was given to the defense by the time the U.S. Attorney's office rested its case and the defense had every reason to believe, therefore, that the tapes or their contents would not be used. Detective Wallace testified as did all the witnesses in his defense before any notice was given. Certainly after this point, no reasonable notice could have been given to Detective Wallace or Donahue, and, in fact, Donahue had finished his direct testimony when for the first time, without any notice, the prosecutor proceeded to cross examine Donahue by using the tape. The following discussion was had with the Court concerning this and again shows the Court admonishing the government for its unfair tactics.

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p. 3225 The Court: How about this point that Gillcrist raised? We have had two defendants take the stand already.

p. 3226 The Court: That may be but reasonable notice would imply that they wouldn't be used in such a way as to be prejudicial.

The Court: You gave assurance apparently that you would give reasonable notice.

p. 3327 The Court: Well, all right, but wouldn't reasonable notice imply that you would do it before the man took the stand?

The Court: Well, that is another point, I am telling you now about prejudice.

Perhaps Mr. Gillcrist's client having seen these tapes and heard these tapes would have elected not to take the stand.

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p. 3227-3228 The Court: I know that nothing specific has been said, as I say, we are faced with a condition, not a theory. The fact is a defendant has taken the stand and now he is being confronted with these tapes on the theory of reasonable notice after he has committed himself.

p. 3228 The Court: Maybe he wouldn't have taken the stand. Isn't it something like the Luck and Brown case?

The Court: Does this involve either of the defendants who has already taken the stand?

Mr. Hannon: Yes, Your Honor.

p. 3228-3229 Mr. Margolius: May I say this, if the Court please, reasonable notice to us means reasonable notice before trial because we are entitled to the statements of the defendant before the trial starts, and a tape recording is a statement of the defendant before the trial starts.

p. 3232 The Court: You are giving me a hard one. You are giving me a very, very hard one. I have a hunch that a Court of Appeals that won't even let you put in a prior conviction would be very hesitant to release this testimony now against the defendants after they have committed themselves.

Mr. Gillcrist: Your Honor, I would just like to reenforce one thing that I think Mr. Hitz not being here, Mr. Hannon was not here, nor do I believe that Mr. Bress was here—as I recall at the pre-trial your

statement, Mr. Sullivan, was, "We do not intend to use these tapes. If we change our minds we will give you reasonable notice or we will give the Court reasonable notice".

p. 3233 The Court: You are refreshing my recollection. I recall that too.

Mr. Gillcrist: I am sure I am 100 per cent accurate on the quote.

Mr. Margolius: No, we have a right to have any statements made by the defendants to examine before trial.

p. 3233 Mr. Hitz: You have a right to appeal to the discretion of the Court.

The Court: I granted that.

p. 3236 The Court: I appreciate all these things, but here is the problem now. We have a witness on the stand, having known what is on this tape, he might take another–he might not have taken the stand. He might take a completely different tack on his direct examination. I did order all of the statements of defendants be turned over before trial. This man hasn't had a chance to prepare himself, in view of his previous statement.

Mr. Sullivan: Yes, Your Honor.

p. 3251 The Court: I am disturbed. Maybe I am a legal butcher–I can just make a ruling and let it stand up legally but there is more to it than just a hornbook piece of law. It is a question of basic fairness.

The Court: I think you all understand the problem I am wrestling with.

Mr. Allder: Wallace wasn't given reasonable notice.

The Court: We have had two defendants on the stand.

Mr. Ailder: And he has not received reasonable notice.

p. 3255 The Court: And not having had notice he assumed that the tapes would not be used against him.

Nevertheless, while questioning Detective Donahue on cross examination and Captain Wert on direct examination on rebuttal, Mr. Sullivan used the transcript of the tape recordings as the Court said in Vol. XXXI(a), page 4270, "you used the transcript to a fare-thee-well."

Mr. Lowe: He used the transcript.

The Court: You used the transcript to a fare-thee-well.

Mr. Sullivan: Because Skeens could back them up by saying yes, he said that to me.

The Court: I think you are too late. You could have asked Donohue were you taped and he would say yes, but you couldn't put the tapes in.

Mr. Sullivan: Your Honor, I certainly didn't feel that I could ask him did you know you were being taped if I knew Your Honor hadn't ruled on it.

The Court: Why were you reading the transcript then?

Mr. Sullivan: Here is what I did, Your Honor: I said in substance did you not say thus and so because I knew that on rebuttal I could put Skeens on the stand to say Donohue in substance said thus and so.

Mr. Gillcrist: Your Honor–Mr. Sullivan–

Mr. Sullivan: May I finish this point, Mr. Gillcrist? Your Honor, we felt barred from mentioning anything about tapes.

The Court: I don't know why.

Mr. Sullivan: Because Your Honor hadn't ruled.

The Court: I hadn't ruled on admissibility of the tapes, that is correct. We didn't even have the

hearing out of the presence of the jury as to whether the tapes were made. All I was ruling on was admissibility.

Mr. Sullivan: It would have prejudiced Donahue indeed, if I conveyed to this jury that this was a taped conversation. If Your Honor said then the tapes were clearly unconstitutional–

The Court: I say the tapes are constitutional but they are not admissible.

Mr. Sullivan: I know Your Honor, but Your Honor, it was subsequent to cross-examination.

The Court: Well, let me think it over. I don't quite get your point. I think you should have raised it on cross-examination.

Mr. Lowe: When you consider that this business of the tapes came at such a late stage. I think Mr. Sullivan is now saying that you ruled subsequent–

The Court: I did. He was cross-examined before I ruled on the admissibility and he, in effect, took a chance they would be inadmissible and I would strike all of the cross-examination.

Mr. Lowe: This is absolutely true but what I am saying is the whole problem came about because they didn't present these to us much sooner according to Your Honor's Order.

2. A conversation between co-defendant Donahue and government informer Skeens was taped subsequent in time to the termination of the alleged conspiracy and the jury was instructed not to consider the contents in determining the guilt or innocence of appellants Bowie or Wallace.

The teaching of *Bruton v. United States*, (391 U.S. 123), compels the conclusion in this particular case perhaps more than in the usual, borderline case that due to the highly prejudicial character of the testimony elicited by the government from co-defendant Donahue while using the tapes in cross-examination, it is a denial of due process to expect or rely on the jury's ability to disregard this highly prejudi-

cial testimony while judging the facts as to Bowie and Wallace.

Had this tape been made known to appellants prior to trial, a motion for severance would almost certainly have been granted. It is highly probable that the convictions of petitioners herein were based on the damaging Donahue tape.

In *Bruton* the Supreme Court repudiated the thought that the trial judge can remove the effect of inadmissible testimony from the minds of the jurors simply by means of an innocuous instruction. *Bruton* approved the statement of Mr. Justice Jackson in his concurring opinion in *Krulewich v. United States,* 366 U.S. 440 at 453, when he said "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction . . ."

THE CASE AT HAND IS ON ALL FOURS WITH THE PRINCIPLES ENUNCIATED IN *BRUTON* EXCEPT FOR THE TENUOUS COAT-HANGING CONFRONTATION DISTINCTION. IF THIS HONORABLE COURT BELIEVES IN THE TEACHINGS THEREIN, THEN IT SHOULD SEIZE UPON THIS OPPORTUNITY TO EXTEND THE DOCTRINE OF *BRUTON* TO COVER THE CASE HEREIN UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

See amendment to opinion of the U.S. Court of Appeals.[1]

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[1]Appellants Wallace and Bowie also argue that the recordings of Donohue's conversations, which were obtained after the informer Barnes had implicated the appellants before the grand jury and the conspiracy was over, contained statements which referred to them in such a way that their impact could not be erased by means of instructions to the jury limiting their application to Donohue, the person who made the statements. *Bruton v. United States,* 391 U.S. 123 (1968). *Bruton,* however, is distinguishable. Based as it was on the right to confrontation contained in the Sixth Amendment, see *Harrington v. California,* ___ U.S. ___ (1969), it should not be extended to cover a situation in which the witness involved actually did take the stand and did affirm the fact that he had made the

3. At the commencement of the trial the government knew that Barnes suborned perjury of Eddie McDaniel and other witnesses in the Nesbit case, *United States v. Robert E. Barnes,* Criminal No. 869-64 and in the Schrider case, *United States v. Robert E. Barnes,* Criminal No. 532-64. Barnes admitted suborning perjury of Mary Hamilton and Eddie McDaniel when he testified at another trial six months after this trial. The Court at this subsequent trial allowed examining of Barnes about his subornation of perjury, which had been denied to these petitioners at their trial, this was in Criminal No. 595-66 in the case of *United States v. Klein, et al.,* as follows:

Klein transcript page 4118 referring to Mary Hamilton.

> Q. And a stranger was going to come into Court and did, in fact, come into Court and testify on your behalf?
>
> A. She wasn't a stranger. I had met her at this after-hours club.
>
> Q. And she volunteered to do this for you?
>
> A. Yes, she did.
>
> Q. She knew that she was perjuring herself when she did it, didn't she?
>
> A. Yes, she did.
>
> Q. Now, you got a great deal of satisfaction out of fooling the jury in that case, didn't you?
>
> A. I didn't get any satisfaction. I had to beat the case, that is all.
>
> Q. And you did whatever was necessary to beat it?
>
> A. I took my best shot.

---

statements attributed to him. Counsel for Wallace and Bowie thus had every opportunity to cross-examine Donohue, although their best tactic probably was to accept Donohue's explanations of his statements at face value.

And Klein transcript page 4262-6266.

Q. Now you had another witness by the name of Eddie McDaniels, didn't you.

A. That is correct.

Q. And he testified that he borrowed your car that day, so that you couldn't have been using your car at the time of the housebreaking. Isn't that correct?

A. That is correct.

Q. And the reason this was important was that you understood that someone–I think the boy–had gotten the number plates of the car, right?

A. Correct.

Q. So you got Eddie McDaniels to testify in this court-house, a whole scheme of how he borrowed the car, of how he spent the day.

I think maybe you should tell us what this scheme was or what this plan was that you had Eddie McDaniels concoct for the jury. Would you do that?

A. In the first place, Eddie McDaniels didn't concoct it. I did.

Q. Well, go ahead.

A. And I was trying to beat the case.

Q. Just tell us what the scheme was that you concocted.

A. I said that he was using–I had told him to say that he was using my car.

Q. But that was just the ultimate. He testified at length. What was he testifying in detail? What was the plan that you arranged for him to testify to?

A. That he had my car all day.

Q. What did you testify–what did he testify that he did that day?

Mr. Sullivan: If Your Honor please, objection to the form of the question. I know Mr. Lowe

misspoke him when he said "You testify." I believe that should be stricken.

The Court: Rephrase the question.

By Mr. Lowe:

Q. Isn't it a fact that you had him testify that he went out with one of your girl friends that day?

A. You are saying she was my girl friend.

Q. One of your friends who happened to be a girl.

A. Right.

Q. Didn't you?

A. He said that.

Q. All right.

And which girl did he say that he went out with?

A. I believe it was Barbara Pizza.

Q. Now he didn't go out in your car with her that day, did he?

A. No, he did not.

Q. But you picked the name Barbara Pizza—not a strange name that you never heard of—but someone you knew—and you picked that name, that person, and put her in this situation. Am I right?

A. Certainly.

Q. And this is the way you work, isn't it?

A. No, sir. I was going to get Barbara Pizza to testify too, but I couldn't find her.

Q. All right. But you use names of people that you know, so that you can weave tales about them. Isn't that correct?

A. I don't weave no tales, Mr. Lowe.

Q. Well, you wove a tale that time through the mouth of Eddie McDaniels.

A. He wove the tale. I didn't. I didn't get up here and testify. He did.

Q. But they were words of you. You masterminded that, didn't you?

A. I told him that I wanted him for a witness, but I didn't get up there and get on the stand and testify. Mr. McDaniels did that. You know he has got a mind of his own. If he didn't want to do it, all he had to do was say, "I don't want to do it." I didn't force him by gun point to get up there.

The question of subornation or perjury is vitally important to petitioners and they should have been allowed to cross-examine Barnes concerning this because of his claim that aside from the testimony of Barnes the most damaging testimony was that of Mary Bray who said that she saw money passing between Barnes and appellant Wallace. The jury may have taken a completely different view of her testimony had they known of Barnes' ability and habit of getting people to perjure themselves on his behalf—particularly Mary Bray being one of his girl friends and one who visited him during the early morning hours in the United States Courthouse with the government's permission.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1969

APPENDIX 1

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,134

LAWRENCE F. WALLACE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 21,135

THOMAS J. DONOHUE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 21,136

BENJAMIN H. BOWIE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeals from the United States District Court
for the District of Columbia

Decided May 6, 1969

Mr. Ira M. Lowe for appellant in No. 21,134.

Mr. Walter E. Gillcrist for appellant in No. 21,135.

Mr. H. Clifford Allder for appellant in No. 21,136.

Mr. William M. Cohen, Assistant United States Attorney, with whom *Messrs. David G. Bress*, United States Attorney, *Frank Q. Nebeker* and *Harold J. Sullivan*, Assistant United

States Attorneys, were on the brief, for appellee. *Mr. Thomas Lumbard*, Assistant United States Attorney, also entered an appearance for appellee in Nos. 21,135 and 21,136.

Before McGOWAN, TAMM and LEVENTHAL, *Circuit Judges*.

PER CURIAM: In November, 1965, Robert Earl Barnes, a professional burglar, now serving a substantial sentence in a federal penitentiary, testified before a grand jury that several members of the District of Columbia Metropolitan Police Department had accepted bribes in return for protecting him from arrest and prosecution for plying his trade. Following the return of indictments on April 22, 1966, and an eight-week trial beginning January 5, 1967, appellant police officers were convicted of conspiracy to violate the District of Columbia bribery statute. 18 U.S.C. § 371 (1964); 22 D.C. Code § 704 (1967).[1] Of the numerous trial errors asserted by appellants, only the admissibility of recorded evidence obtained through the use of an informer presents issues meriting extended discussion. Having reserved decision on one of these issues pending its resolution by the Supreme Court, we now conclude that the recordings were lawfully obtained and were admissible in evidence, and that none of the other alleged errors denied appellants a fair trial. Accordingly, we affirm their convictions.

I

The Government monitored and recorded certain face-to-face and telephone conversations between appellants Wallace and Donohue and their acquaintance James Skeens, a sometime gambler who was a party to the Government surveillance. Most of the conversations recorded took place in February, 1966; two occurred early in April of that year.

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[1] Appellants Wallace and Bowie were also convicted of accepting individual bribes, although Bowie was acquitted on one substantive bribery count. Appellant Donohue was acquitted of bribery. Two other police officers were acquitted of all charges, including a conspiracy count.

The Government before trial informed appellants' counsel of the existence of these recordings but obtained a protective order from the trial judge denying appellants discovery of the recordings because Skeens believed that disclosure of his identity as an informer would imperil the lives of his family and himself. The prosecutor stipulated at an unrecorded pre-trial conference that he did not then intend to use the recordings, and that he would give defense counsel reasonable notice if he later decided to offer them as evidence at the trial. Midway through the trial, after appellant Wallace had completed his testimony on direct and cross, and at the end of the direct examination of appellant Donohue, Skeens changed his mind and agreed to testify for the Government, with the understanding that the Government would provide armed marshals to protect his family. The trial court ruled, over the objections of all three appellants, that Skeens would be permitted to testify in rebuttal and that the recordings could be used as corroboration.

It later developed, however, that due to an inconclusive exchange between counsel and the trial judge with respect to the consequences of Skeens' waiving his attorney-client privilege *vis-a-vis* his former counsel, who also was trial counsel for appellant Donohue, Skeens did not take the stand, with the tacit acquiescence of all counsel at the trial. Transcripts of the recorded conversations were used to cross-examine Donohue, who admitted participating in the conversations and attempted to explain certain incriminating statements in them by alleging that they were part of the stock-in-trade of an undercover agent. The Government later called the monitoring officer to testify to statements made by Wallace tending to rebut his testimony. It also introduced portions of the transcripts in evidence in connection with the officer's rebuttal testimony. Finally, counsel for Wallace introduced parts of the recordings which tended to exculpate Wallace.

Appellants Wallace and Donohue[2] urge that the recordings were inadmissible because they were seized in violation of the Fourth Amendment and the law of the State of Maryland where most of the surveillance took place. Appellants further claim that obtaining recorded admissions through an informer after Barnes had implicated them before the grand jury violated their Sixth Amendment right to counsel. Finally, they allege that the decision to use the recordings after some of them had testified at the trial could not possibly afford them the reasonable notice promised in the pre-trial agreement.

A. Fourth Amendment Claim

Appellants argue that the Supreme Court's ruling in *Katz v. United States*, 389 U.S. 347 (1967), should be extended to bar the use at trial of recorded evidence obtained without a warrant, even though one party to the recorded conversation consented to the surveillance. Courts have divided on this question,[3] but, whatever the reach of the *Katz* decision, it cannot aid these appellants. The Supreme Court has now held that the exclusionary rule adopted in *Katz* shall not be applied to evidence obtained through electronic surveillance

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[2]Appellant Bowie also claims error in the use of the recordings, but lacks standing to challenge the manner in which they were obtained. Alderman v. United States, 37 U.S.L.W. 4189, 4191-92 (U.S. March 10, 1969).

[3]Cases holding that the *Katz* decision applies to so-called consensual surveillance are Doty v. United States, Nos. 9031-38 (10th Cir., June 4, 1968), *petition for rehearing en banc granted sub nom.*, Epps v. United States, No. 9032 (10th Cir., July 29, 1968); United States v. White, ___ F.2d ___ (7th Cir., Jan. 7, 1969) (*en banc*), *cert. granted*, 37 U.S.L.W. 3379 (U.S. April 7, 1969); United States v. Jones, 292 F.Supp. 1001 (D.D.C. 1968), *appeal docketed*, No. 22,529 (D.C. Cir. Nov. 29, 1968); *but see* Holt v. United States, 404 F.2d 914 (10th Cir. 1968). Cases holding to the contrary are Dancy v. United States, 390 F.2d 370 (5th Cir. 1968) (electronic monitoring); Dryden v. United States, 391 F.2d 214 (5th Cir. 1968) (telephonic communication); Kaufer v. United States, ___ F.2d ___ (2d Cir. 1968), *aff'd*, 37 U.S.L.W. 3365 (U.S. April 1, 1969) (citing Desist v. United States, 37 U.S.L.W. 4225 (U.S. March 24, 1969)).

conducted before December 18, 1967, the date of the *Katz* decision, and the conversations involved here took place nearly two years before that date. *Desist v. United States*, 37 U.S.L.W. 4225 (U.S. March 24, 1969), *and see Kaufer v. United States*, 37 U.S.L.W. 3365 (U.S. April 1, 1969).

B. Claim Under Maryland Law

Maryland law proscribes electronic surveillance and wiretapping without prior judicial approval even if one party to the conversation consents. Md. Ann. Code, Art. 27, §§ 125 A-D (1967 Replacement Volume); Art. 35, §§ 92-99 (1965 Replacement Volume). The Government maintains that these prohibitions do not apply to the surveillance in this case, though most of it occurred in Maryland, for two reasons: (1) the Maryland statutes contain exceptions for surveillance conducted by the Federal Bureau of Investigation or by "any other federal investigating agency;" Md. Ann. Code, Art. 27, §§ 125c, 585 (1967 Replacement Volume); Art. 35, § 98 (1965 Replacement Volume), and (2) the evidence is admissible in federal court even if it was obtained in violation of state law.

We believe that the surveillance in this case was undertaken by a federal investigating agency within the meaning of the statutory exception. The violations of law investigated and prosecuted arose under the federal conspiracy and District of Columbia bribery statutes, both offenses against the United States which are prosecuted in its name. Moreover, the investigation, carried on by Metropolitan Police officers, was conducted under the direct supervision of the office of the United States Attorney. Accordingly, in the absence of a contrary interpretation of the Maryland statute by its own courts, we hold that, for the purposes of this case, the surveillance was conducted by a "federal investigating agency." Because we agree that the surveillance was not forbidden by the Maryland statute under these conditions, we do not reach the question of whether federal courts may freely admit evidence obtained in violation of state law. *Cf. United States v. Pardo-Bolland*, 348 F.2d 316, 323 (2d Cir.), *cert. denied*, 382 U.S. 944 (1965).

C. Sixth Amendment Claim

Appellants Wallace and Donohue argue that their statements to Skeens were inadmissible, despite the fact that they had not been arrested, indicted, or otherwise formally charged, because they were obtained without counsel present after the investigation had "focused" upon them. *Escobedo v. Illinois*, 378 U.S. 478 (1964); *compare Massiah v. United States*, 377 U.S. 201 (1964). Barnes testified concerning appellants' illegal activity before the grand jury in November, 1965. The monitored conversations used at trial took place in February, 1966; appellants were indicted in April, 1966.

Appellant Donohue stresses the fact that in early December, 1965, the prosecutor invited him to discuss some allegations made against him, but said he would not do so unless Donohue brought with him an attorney or a friend. Donohue engaged counsel who was present at two meetings with the prosecutor, at which the prosecutor sought to obtain a confession from Donohue and his cooperation as a witness.

The Sixth Amendment does not forbid the securing of admissions by undercover tactics from a suspect prior to arrest or indictment. No danger of coercion compels police officers and courts to pick a peril-point in an investigation at which the right to counsel attaches to bar further undercover investigation. Law enforcement officers need not, and as a practical matter cannot, be required to halt a criminal investigation when "they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction." *Hoffa v. United States*, 385 U.S. 293, 310 (1966). The right to counsel has been extended to phases of an investigation prior to arrest or formal charge only when the suspect was in custodial circumstances. *Mathis v. United States*, 391 U.S. 1 (1968); *Miranda v. Arizona*, 384 U.S. 436, 444 n.4 (1966). While it was entirely proper for the prosecutor to advise appellant

Donohue to bring counsel to their conferences, the Sixth Amendment did not compel him to elect between efforts to secure Donohue's cooperation, so long as counsel was present when those efforts were made, and further undercover investigation to obtain admissions if those efforts did not succeed.

D. Reasonable Notice Under the Pre-trial Agreement

Appellants claim that the trial court abused its discretion in allowing the use of the Skeens' evidence after appellants Wallace and Donohue had testified in the expectation that it would not be available. The trial court recognized that "reasonable notice" under the agreement was not simply a question of allowing time for defense counsel to digest the transcripts, but one of fairness in admitting the evidence after appellants had taken the stand and committed themselves. The trial judge after inquiry accepted the Government's representations that Skeens had been unavailable up to the time that he changed his mind about testifying, and concluded that the public should not be penalized for the prosecutor's inability to persuade Skeens to testify earlier in its case-in-chief. Without overlooking the importance of appellants' right to discovery and notice, he allowed the testimony in the belief that it was probative, and rejected the argument that appellants were entitled under all circumstances to count on Skeens' continuing unavailability in taking the stand. We think his decision to permit the use of the testimony was well within his discretion, particularly since he limited its use, and incidentally its effectiveness, to the rebuttal of matters raised earlier in the trial.

II

Of the other issues raised by the appellants, none is meritorious and few require mentioning, much less serious discussion. What follows is a brief review of the more weighty points made by appellants. Appellants Donohue and Bowie moved for a mistrial, and Wallace claimed that he was entitled to severance, when it came out at trial that two

witnesses were afraid to testify.[4] These motions were denied after the trial judge admonished the jury not to be influenced by any improper considerations. We find no error in these rulings.

Another alleged error involved a newspaper column detailing threats to jurors and to the prosecutor in charge of the case. After this came to the attention of the judge, he interviewed the jurors separately in chambers in a procedure agreed to by all counsel. The court obtained satisfactory assurances that the jurors could render a verdict not prejudiced by the publicity. *Cf. United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962), *cert. denied sub nom., Guippone v. United States*, 372 U.S. 959 (1963). The responses of the jurors on voir dire indicated their commendable efforts to avoid reading comment on the trial. And special verdicts, including acquittal of two defendants on all counts and of two of the appellants on some counts, serve to confirm the court's finding that the jury would be able to render an impartial verdict.

A trial involving charges of police corruption, lasting many weeks, most probably cannot be quarantined even with the best efforts of all concerned. However, the prosecution does bear a special responsibility to avoid tactics that needlessly add spice to the atmosphere which inevitably

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[4]One witness refused to identify appellants Bowie and Donohue when asked to do so by the prosecutor. He did not claim surprise, but learned from her later that she thought a man in a white car had been watching her house. The prosecutor reassured her, and the judge allowed her to be recalled to make the identification. It was later brought out at the trial that a policeman in a white car had been searching the area for a witness in an unrelated case.

In the second incident, another witness replied to an ill-advised question put by counsel for Wallace that Wallace and Bowie had threatened him, but subsequently explained that neither defendant had threatened him directly. What prejudice remained after this clarification was largely created by defense counsel, and properly prompted the trial court to caution defense counsel against deliberately playing for a mistrial.

will hang over such trials. We are not impressed by the prosecutor's questioning appellants about connections with criminal characters where the inquiries were never tied up with the incidents charged at trial, nor by what we consider to be a trial needlessly prolonged by a lengthy cataloguing of incidents involving the protagonist, Barnes, which often did not even involve any of the appellants. The prosecutor may have thought that appellants' general acquaintance with the criminal element in the District would help to establish the conspiracy, a doubtful proposition for a group of detectives who can be expected to know who's who in the underworld. In any event, the cumulative potential for prejudice in open-ended questioning outweighed the materiality of the disclosure that appellants were acquainted with a number of local criminals. When it became apparent that these questions were leading nowhere, the trial court cut them short, in time, we think, to prevent undue prejudice to appellants. There may be cases, however, where the court cannot judge the materiality of references to underworld associations until the damage has been done, and thus we emphasize the prosecutor's duty of restraint.

Appellants also challenge the sufficiency of the evidence to show knowledge of a conspiracy, claim that they were denied discovery of significant evidence, and assert that they were denied a full cross-examination of Barnes. We find that there was adequate evidence to show mutual knowledge of a common criminal enterprise. No evidence of importance to the defense was withheld, and Barnes was cross-examined for four days, on all but three plainly minor and collateral matters. We thus conclude that none of the alleged errors, individually or cumulatively, tainted appellants' trial, and affirm their convictions.

Affirmed.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed June 24, 1969]
[Nathan J. Paulson, Clerk]

No. 21,134-5-6 September Term, 1968

Lawrence F. Wallace,
Thomas J. Donohue,
Benjamin H. Bowie,
Appellants,

Criminal No. 486-66

v.

United States of America,
Appellee.

ORDER

It is ORDERED by the Court, *sua sponte,* that the opinion filed herein on May 6, 1969 be amended as follows:

1. Add "3a" at the end of the paragraph on page 7 headed *D. Reasonable Notice Under the Pre-Trial Agreement.*

2. At the bottom of page 7 add the following footnote:

> [3a]Appellants Wallace and Bowie also argue that the recordings of Donohue's conversations, which were obtained after the informer Barnes had implicated the appellants before the grand jury and the conspiracy was over, contained statements which referred to them in such a way that their impact could not be erased by means of instructions to the jury limiting their application to Donohue, the person who made the statements. *Bruton v. United States,* 391 U.S. 123 (1968). *Bruton,* however, is distinguishable. Based as it was on the right to confrontation contained in the Sixth Amendment, see *Harrington v. California,* ___ U.S. ___ (1969), it

should not be extended to cover a situation in which the witness involved actually did take the stand and did affirm the fact that he had made the statements attributed to him. Counsel for Wallace and Bowie thus had every opportunity to cross-examine Donohue, although their best tactic probably was to accept Donohue's explanations of his statements at face value.

3. Change the second paragraph of footnote 4 on page 8 to read as follows:

> In the second incident, another witness replied to an ill-advised question put by counsel for Wallace that Wallace and Donohue had threatened him, but subsequently explained that neither defendant had threatened him directly. Such prejudice as remained after this clarification does not appear to have been so substantial as to warrant our holding that the trial court abused its discretion in denying Donohue a *mistrial.*

Per Curiam

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed July 2, 1969]
[Nathan J. Paulson, Clerk]

No. 21,134 — September Term, 1968

Lawrence F. Wallace, — Criminal No. 486-66
Appellant,

v.

United States of America,
Appellee.

No. 21,135

Thomas J. Donohue,
Appellant,

v.

United States of America,
Appellee.

No. 21,136

Benjamin H. Bowie,
Appellant,

v.

United States of America,
Appellee.

Before: McGowan, Tamm and Leventhal, Circuit Judges, in Chambers.

ORDER

On consideration of appellants' petitions for rehearing, it is ORDERED by the Court that appellants' aforesaid petitions are denied.

Per Curiam.

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364-635—69——1

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 535

LAWRENCE F. WALLACE AND BENJAMIN H. BOWIE, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 536

THOMAS J. DONAHUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1 and 2)[1] is not yet reported.

[1] Pet. references are to the petition in No. 535.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1969. A petition for rehearing was denied on July 2, 1969. The Chief Justice extended the time for filing a petition for a writ of certiorari to August 30, 1969, and on August 29 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Conversations between petitioners Wallace and Donahue and an informer were monitored and taped. Because of fear for the safety of the informer, who refused to testify, a protective order was placed around these tapes and discovery was denied. The government agreed that the tapes would not be used except upon reasonable notice. It was not until late in the trial that the informer was persuaded to testify. One defendant had already testified; another had completed his direct testimony. The question is whether, in these circumstances, it was error for the trial judge to allow the transcript of the tapes to be used for the limited purpose of rebuttal.

2. Whether it was a denial of due process to deny a request for immunity for a defense witness whose testimony would only add to the impeachment of a witness whose testimony did not relate to petitioner and who had already been thoroughly impeached.

3. Whether the trial judge committed error in refusing to allow a witness, already severely impeached, to be further impeached by questions aimed at demon-

strating an alleged subornation of perjury at an earlier trial.

4. Whether it was error under *Bruton* v. *United States,* 391 U.S. 123, to allow a defendant to be cross-examined by use of prior statements incidentally implicating co-defendants, where such defendant took the stand, was subject to cross-examination, and affirmed the statements as his own.

5. Whether pre-indictment electronic monitoring of conversations between petitioner Donahue and a government informer violated petitioner's constitutional rights.

6. Whether petitioners had a fair trial.

STATEMENT

After a ten-week jury trial in the District Court for the District of Columbia, petitioners were convicted of conspiracy to violate the District of Columbia bribery statute (18 U.S.C. 371; 22 D.C. Code 704).[2] They were each sentenced to concurrent terms of imprisonment of 16 to 48 months.

The evidence showed that in November 1965, one Robert Earl Barnes, a professional burglar with several felony convictions for burglary, testified before a grand jury that petitioners, who were members of the Metropolitan Police Department of the District of Columbia, had accepted substantial bribes on nu-

[2] Petitioners Wallace and Bowie were also convicted of accepting individual bribes, although Bowie was acquitted on one substantive bribery count. Petitioner Donahue was acquitted of bribery. Two other police officers, tried with petitioners, were acquitted of all charges.

merous occasions in return for protecting him from arrest and prosecution.

During the course of investigation, the government monitored and recorded several face to face and telephone conversations between petitioners Wallace and Donahue and one James Skeens, an underworld acquaintance who was a party to the government surveillance. Most of these conversations, containing highly damaging statements, took place in February, 1966. All took place prior to indictment in April, 1966.

Prior to trial, the government informed petitioners' counsel of the existence of these recordings but obtained a protective order[3] denying petitioners discovery of the contents. The order was based on an affidavit by Skeens expressing fear that the disclosure of his identity would imperil the lives of his family and himself.[4] In accordance with Skeens' wishes not to have his identity disclosed, the government attorney stipulated that it was not presently his intention to use the tapes but that reasonable notice would be given if they were to be used at the trial.

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[3] Rule 16(e) of the Federal Rules of Criminal Procedure provides in relevant part, "Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the government the court may permit the government to make such showing, in whole or in part, in the form of a written statement to be inspected by the court *in camera*. * * *"

[4] The trial judge remarked that he was satisfied that the informer's fear was "bona fide" (Tr. Vol. 24: 3320) and that there was no way the material could be edited to preserve the informer's identity (Tr. Vol. 24: 3273).

During the seventh week of trial, after petitioner Wallace had testified and petitioner Donahue had completed direct examination, the government informed petitioners' counsel that at a late hour the previous evening, Skeens had agreed to testify on condition that armed marshals be provided to protect his wife and child.[5] The trial court conducted a lengthy hearing into the advisability of allowing the government to use this witness and/or the recorded conversations for cross-examination or rebuttal. After taking the matter under advisement over the weekend, the court ruled that Skeens would be allowed to testify but that his testimony or any other rebuttal evidence could only be used within the accepted scope of rebuttal and not to the extent it could have been used in the case-in-chief (Tr. Vol. 23: 3213–3215).

Petitioners' counsel were then provided with transcripts of the recordings and were given time to become familiar with the content (Tr. Vol. 24: 3312–3330). Subsequently, Skeens took the stand and confirmed the government's representation that his fear had previously kept him from testifying. However, after an exchange concerning the extent of waiver of his attorney-client privilege with petitioner Donahue's counsel, who was formerly Skeens' attorney, it was determined that Skeens would not testify (Tr. Vol. 32: 4324a–4368; Vol. 32A: 4416). Thereafter the gov-

[5] Skeens' fear of having his identity revealed apparently was not derived from a fear of any action by these petitioners, but rather, from his underworld associates. Subsequent to the trial, Skeens' wife was murdered.

ernment used the transcripts of the taped conversations on cross-examination of petitioner Donahue.[6]

In rebuttal of petitioner Wallace's testimony, the government called the officer of the Internal Investigation Unit of the Police Department who monitored the conversation between Skeens and petitioner Wallace. He testified to portions of the conversation in which Wallace made inculpatory statements (Tr. Vol. 32: 4383).[7] On cross-examination Wallace elicited portions of this conversation which were favorable to him (Tr. Vol. 32: 4386–4401).

2. During the course of the trial, Barnes testified that in September 1964, he, one Epperson, and another staged a robbery of Stanley Sonneborn's apartment in the District of Columbia. He said that codefendant Denham [8] arranged the robbery for Sonneborn, a bookmaker, so that the latter would not have to pay off on numbers bets he had lost. Barnes also stated that petitioner Wallace informed him after the robbery that Epperson had been identified as a participant (Tr. Vol. 3: 419–433).

On cross-examination by Denham's counsel, Barnes was impeached by use of his testimony before the grand jury in November 1965 in which he had stated that the Sonneborn robbery was staged by one Walter

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[6] Donahue admitted making the statements but attempted to explain that he was lying to Skeens at the time (Tr. Vol. 26: 3547).

[7] This conversation was not recorded due to a malfunction in the recording equipment.

[8] Denham is one of the officers who was subsequently acquitted.

Oberfield, not Denham as he testified at trial, and in which he made no mention to the grand jury of the robbery being staged on Sonneborn's behalf (Tr. Vol. 7:1043–1073). None of petitioners' counsel explored this area on cross-examination. In an effort further to impeach Barnes on this matter, Denham sought to call Sonneborn as a witness and represented that Sonneborn would testify that he did not know Barnes or Denham nor did he ever make an arrangement to be robbed. However, when called to testify, Sonneborn invoked his privilege against self-incrimination.[9] Denham's attorney requested that the government grant immunity from prosecution to Sonneborn. This request was denied.

3. At trial Barnes admitted committing a certain burglary for which he had previously been tried and acquitted. He did not testify at that trial but several witnesses testified on behalf of the defense (Tr. Vol. 3:464–465; Vol. 4:570–571; Vol. 5:775–776). He also admitted committing another burglary for which he was convicted despite the testimony of alibi witnesses. This conviction was reversed on appeal (*Barnes* v. *United States,* 365 F. 2d 509), but prior to the instant trial Barnes pled guilty to the charges. Petitioners sought to question Barnes as to whether he suborned perjury on the part of the witnesses who testified at the previous trials. The allegation was not supported

[9] His counsel represented to the court that the privilege was being asserted to prevent admissions concerning Sonneborn's gambling activities and income which might subject him to prosecutions for violations of gambling statutes or the Internal Revenue Code.

with a proffer of independent proof. The trial judge ruled that (Tr. Vol. 6: 800–801):

> If there had been a charge of subornation of perjury and there had been convictions of subornation of perjury in the other case, that is one thing; but we don't have that. What you are in effect asking me to do is try another case of subornation of perjury which is not present in this case; it is purely collateral.
>
> As far as Barnes is concerned, you have oodles of impeachment material. You are not being deprived of the opportunity to test his credibility. You have the grand jury minutes. You have the Jencks Act statements. You have been able to use them. The jury knows this is a convicted felon who has testified inconsistently in various places.
>
> To go now into a collateral case and ask me to try a subornation of perjury in another matter, I think is going beyond the scope of cross-examination.

ARGUMENT

1. The trial court properly found that the government's notice of its intent to use petitioners' recorded statements was not unreasonable under the circumstances. The government was clearly acting in good faith in not disclosing Skeens' identity or the substance of the conversations. The uncontradicted affidavits and Skeens' testimony at trial amply support the trial court's findings that the government's representations were "bona fide," and that the protective order was necessary (Tr. Vol. 24: 3320). Moreover, contrary to petitioners' allegation, the delay in dis-

closure of Skeens' identity was not a trial tactic of the government. The record shows that Skeens was not persuaded to testify until that particular time during the trial.[10]

The trial judge's decision to let Skeens testify and to allow the tapes to be used for rebuttal did not impinge upon petitioners' right not to testify. Contrast *Harrison* v. *United States,* 392 U.S. 219. Petitioners Wallace and Donahue had taken the stand in full knowledge that the government had an informant whose identity was being protected for his safety, and that this informant had previously engaged them in conversations concerning this case which were recorded and in the government's possession. It was therefore proper for the trial court to conclude that petitioners' decision to testify was subject to the risk that the live testimony of the informant and/or the recordings could be used to impeach their testimony should the informant decide to testify. Under these circumstances, the trial judge, who made the transcripts available to the petitioners and allowed them ample time to digest them, did not err by allowing the government to use these conversations for the limited purpose of rebuttal. Nor did the trial judge abuse his discretion in deciding that the highly probative value of the evidence outweighed the possibility of prejudice and that the public should not be penalized for the govern-

[10] Petitioners' claim that because Skeens was incarcerated further protection was unnecessary and disclosure should have been made prior to commencement of the trial ignores the fact that Skeens feared not only for his own safety, but also for the safety of his wife and child.

ment's inability to persuade Skeens to testify earlier.

2. Petitioner Donahue was not prejudiced by the denial of a request of immunity for tendered defense witness Sonneborn. As admitted by petitioner Donahue, Barnes' testimony did not implicate Donahue in the Sonneborn affair. Furthermore, the testimony of Barnes on this point was severely impeached by the use of his prior testimony before the grand jury on this matter.[11] The denial of a grant of immunity to Sonneborn deprived petitioner Donahue merely of an opportunity for additional impeachment of a matter purely collateral to his case.[12] In cases where the prospective witness' testimony is of such tenuous relevance and importance, it is not violative of due process to refuse to grant a defense witness immunity to enable him to testify. *Earl* v. *United States,* 361 F. 2d 531 (C.A.D.C.), certiorari denied, 388 U.S. 921, and *Morrison* v. *United States,* 365 F. 2d 521 (C.A.D.C.).

3. Petitioners claim that the trial court erred in not allowing them to cross-examine Barnes as to whether he had suborned perjury in two earlier housebreaking trials in which he was the defendant. The trial court has traditionally had great discretion in regulating the

[11] The effect of this impeachment is indicated by the fact that the co-defendant Denham, the person implicated by Barnes' testimony in this matter, was subsequently acquitted.

[12] We note, moreover, that contrary to petitioner Donahue's allegations (Pet. No. 536, 11), Barnes did not receive either statutory or constitutional immunity. He has, in fact, been convicted by his own pleas of guilty to ten felonies in four cases to which he testified both at trial and at the grand jury.

extent and scope of cross-examination. This is particularly true where the cross-examination, as here, is designed solely to test a witness' general credibility rather than to probe substantive issues raised on direct examination. Moreover, the charge of subornation of perjury which petitioner sought to raise was not based on a previous conviction. Previous acts of misconduct which do not result in conviction may not be used. See *United States* v. *Provoo,* 215 F. 2d 531, 536 (C.A. 2).

Furthermore, Barnes was rigorously cross examined for four days. His prior criminal record and his extensive criminal activities during the time of the conspiracy were spread before the jury. As noted *infra,* p. 8, the trial judge recognized that under the Jencks Act the defense was provided with Barnes' numerous prior statements as well as his grand jury testimony which were extensively used by counsel to impeach Barnes' credibility with prior inconsistent statements. In its final charge the court specifically instructed that the testimony of Barnes, as a co-conspirator and accomplice of the defendants, "should be received with caution and scrutinized with care" (Tr. Vol. 35: 4902–4903). Under these circumstances, it was not an abuse of discretion to prevent cross-examination as to petitioners' claim that he had suborned perjury in his previous trials.

4. It was not error to allow cross-examination of petitioner Donahue by statements made by him even

though portions thereof referred to petitioners Bowie and Wallace. Reliance by the latter on *Bruton* v. *United States,* 391 U.S. 123, is misplaced. *Bruton* was founded on the right to confrontation guaranteed by the Sixth Amendment. Here, unlike *Bruton,* the co-defendant, Donahue, testified and affirmed the fact that he made these statements (see *Douglas* v. *Alabama,* 380 U.S. 415, 419-420), so that counsel for petitioners was not deprived of the opportunity to confront and cross-examine. The courts of appeals have uniformly held that under such circumstances no violation of *Bruton* is committed. *E.g., United States* v. *Boone,* 401 F. 2d 659, 663 (C.A. 3), certiorari denied *sub nom. Jackson* v. *United States,* 394 U.S. 933; *Rios-Ramirez* v. *United States,* 403 F. 2d 1016 (C.A. 9), certiorari denied, 394 U.S. 951. Further, the trial judge twice instructed the jury that these statements were made after the termination of the conspiracy and thus were binding only on the person who made them. There is no basis for believing that the instant jury, which returned verdicts which included both convictions and acquittals on specific counts, was unable or unwilling to follow the trial judge's instructions. Cf. *Bruton* v. *United States, supra,* 391 U.S. at 135.

5. Petitioner Donahue contends that the recorded conversations violated his right to counsel under the Sixth Amendment. However all recorded and overheard conversations took place prior to indictment. Thus *Massiah* v. *United States,* 377 U.S. 201, is in-

applicable. As expressed by this Court in *Hoffa* v. *United States,* 385 U.S. 293, 310:

> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

Nor, in the present case, did any of the discussions between petitioners and Skeens interfere in any way with their relationship with their lawyers (see *Hoffa, supra,* at 304–309).

Petitioner Donahue also contends that the use of electronic equipment to record his conversations with the informer, with the latter's consent, impinged upon his Fourth Amendment rights under *Katz* v. *United States,* 389 U.S. 347.

As noted by petitioner this question is identical with that pending in *United States* v. *White,* No. 46, this Term, certiorari granted, 394 U.S. 957. It would therefore seem appropriate for this Court to defer consideration of this issue until a decision is rendered in *White.*

6. All petitioners claim that they were prejudiced by inquiry concerning their connections with under-

world characters. The excerpts which they have reproduced, however (Pet. 5–11), rather than indicating undue prejudice, show instead that the trial judge recognized and preserved petitioners' rights. As the court of appeals noted (Pet. App. 1, 31): "When it became apparent these questions were leading nowhere, the trial court cut them short, in time, we think, to prevent undue prejudice to appellants."

Respectfully submitted.

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